

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

G&T CONVEYOR CO. INC,

Plaintiff,

v.

PORT OF SEATTLE,

Defendant.

CASE NO. C07-1380RSM

ORDER DENYING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT, GRANTING IN PART
DEFENDANT'S CROSS-MOTION
FOR SUMMARY JUDGMENT, AND
DIRECTING PARTIES TO
PROCEED WITH THE DISPUTE
RESOLUTION PROCESS

I. INTRODUCTION

This matter comes before the Court on "Plaintiff G&T Conveyor Company, Inc.'s Motion for Partial Summary Judgment" (Dkt. #7), and Defendant "Port of Seattle's Cross Motion for Summary Judgment" (Dkt. #14). Plaintiff G&T Conveyor Company, Inc. ("G&T") argues that Defendant Port of Seattle ("the Port") must immediately pay G&T certain amounts pursuant to the terms of the contract entered into by the parties. G&T also argues that the Port has waived their right to participate in the dispute resolution process pursuant to the contract, thereby making the instant claim ripe for review in this Court.

The Port responds that G&T's arguments are based on a faulty interpretation of the contract, and that no immediate payments are due at this time. The Port further argues that it has not waived its right to follow the dispute resolution process of the contract. Thus, the Port argues that G&T has no right to maintain an action before the Court and seeks dismissal

of G&T's claims. Alternatively, the Port argues that the Court should enter a declaratory judgment requiring the parties to proceed with the dispute resolution process.

For the reasons set forth below, the Court DENIES "Plaintiff G&T Conveyor Company, Inc.'s Motion for Partial Summary Judgment" and GRANTS IN PART Defendant "Port of Seattle's Cross Motion for Summary Judgment"

II. DISCUSSION

A. Background

G&T is a Florida corporation engaged in the business of the design, construction, and installation of sophisticated, complex, integrated security screening baggage handling systems at airports across the United States. (Dkt. #1, Pl.'s Compl., ¶¶ 1.1, 3.1). The Port is a municipal corporation that owns and operates the Seattle-Tacoma International Airport ("Sea-Tac"). (*Id.* at ¶ 1.2). On May 14, 2004, G&T successfully bid on a fixed-price contract for the construction and installation of a baggage handling system at Sea-Tac in the amount of \$25.3 million. (Dkt. #14 at 2). The project, which was part of a multi-billion dollar capital improvement program at Sea-Tac, is known as the C60 Baggage Handling System Project (the "C60 project"). (*Id.*).

Pursuant to the terms of the contract for the C60 project, general written conditions were agreed upon by the parties. The portions of the contract that the parties allege are pertinent to this litigation include:¹

G-01.02	Definitions
G-02.01	Intent of the Contract Documents
G-02.02	Correlation of the Contract Documents
G-04.31	Notice of Claims
G-04.32	Prerequisite to Suit
G-07.02	Progress and Completion
G-07.03	Extension of Contract Time
G-08.01	All Payments Subject to Applicable Laws
G-08.02	Scope of Payment
G-08.04	Progress Payments
G-08.06	Payment for Work Done on a Force Account Basis
G-08.07	Payment for Changes

¹ The Court will discuss the applicable provisions, where appropriate, in its "Discussion" session below.

1 G-09.01 Port May Make Changes
 G-09.04 NTE and Unilateral Change Orders
 2 G-09.05 Changed Conditions and Claims including REAs
 G-09.06 Procedure for Protest by the Contractor
 3 G-10.02 No Waiver of Port's Rights
 G-10.10 Port's Right to Withhold Payment
 4

5 (Dkt. #14, Ex. 1).²

6 In addition to these general conditions, the contract for the C60 project also included
 7 supplementary conditions. (*Id.*, Ex. 2). Both parties agree that the pertinent supplementary
 8 condition ("SC") in the instant case is SC-09.06, titled "Procedure for Protest by the
 9 Contractor." (*Id.*). In sum, this provision requires the parties to submit to a Dispute Review
 10 Board ("DRB") if a disputed claim is not resolved after a certain meeting takes place, and to
 11 nominate a member to the DRB within 60 days of the date of the award. (*Id.*).

12 As alleged by the Port, G&T began work on the C60 Project soon after May 14, 2004,
 13 and was supposed to have achieved substantial compliance by March 31, 2006. (*Id.*). The
 14 Port alleges that the date of substantial completion was extended to September 4, 2006, but
 15 that G&T has not yet achieved that milestone. (*Id.* at 3). However, G&T alleges that it has
 16 completed the base contract work. (Dkt. #7 at 2). Furthermore, during the course of the C60
 17 project, a significant number of change orders were issued by the Port.³ G&T alleges that in
 18 addition to completing the base contract work, it has also completed the work related to the
 19 change orders to the C60 project. (*Id.*).

20 Based on its completion of the change orders, G&T delivered a "Request for Equitable
 21 Adjustment" ("REA") on May 10, 2007. (Dkt. #8, Ex. 3). In the REA, G&T requested
 22 approximately \$16.6 million in addition to the fixed contract amount. (*Id.*). On May 16,
 23 2007, the respective parties met to discuss G&T's REA. (*Id.*, Ex 4). During the meeting,
 24 G&T alleges that the Port acknowledged that "G&T is owed more money than the current

25 ² Both parties at different times call the relevant provisions "sections." The Court will adhere to
 26 the provisions as "articles," the title given to them by the contract itself.

27 ³ G&T alleges that 163 change orders were issued by the Port (Dkt. #1, ¶ 3.5), whereas the Port
 28 alleges that 165 change orders were issued by the Port. (Dkt. #17 at 13).

1 C60 contract value,” and that “G&T is owed more money than it has been paid for the change
 2 orders issued.” (*Id.*). Nevertheless, the Port, through the declaration of Michael Mequet
 3 (“Mr. Mequet”) - who was in charge of and responsible for all major capital construction
 4 projects undertaken by the Port - alleges that although they acknowledged that “G&T was
 5 probably due additional money under its Contract . . . *all change issues*, both those in favor of
 6 G&T and those in favor of the Port, would have to be analyzed to make a *final determination*
 7 *as to monies owed.*” (Dkt. #14, Decl. of Mequet, ¶ 8) (emphasis added).

8 Two subsequent meetings occurred on May 24, 2007, and May 30, 2007. (Dkt. #14
 9 at 9). The Port alleges that several questions were raised by the Port regarding the REA at
 10 these meetings. (*Id.* at 9-10). The Port alleges that Mr. Mequet indicated to G&T at these
 11 meetings that it was not possible for the Port to make a realistic assessment of any element of
 12 the REA at that time. (*Id.*). In addition, Mr. Mequet allegedly pointed out to G&T that
 13 because G&T had taken many months to put the REA together, it was only fair that the Port
 14 be given adequate time to analyze the documentation. (*Id.*).

15 Shortly thereafter, on June 1, 2007, G&T submitted another bill to the Port indicating
 16 that the total amount of the services rendered by G&T exceeded \$52.9 million. (Dkt. #7, Ex.
 17 5). The bill also indicates the Port had paid approximately \$34.7 million to G&T, thereby
 18 creating a then current balance of approximately \$18.2 million. (*Id.*). The Port has not,
 19 however, paid this amount to G&T because it claims it is “engag[ing] in a diligent, rigorous
 20 and extensive effort to review, analyze and evaluate the documentation provided by G&T in
 21 support of its REA.” (Dkt. #14 at 10). The Port indicates that the following events show that
 22 it has been reviewing G&T’s REA in accordance with standard procedures:

- 23 - On May 10, 2007, G&T submitted the initial REA seeking \$16.6 million
 24 (including \$1.7 M for its electrical subcontractor Elcon). The REA included 4
 notebooks with 95 exhibits.
- 25 - On May 30, 2007, the Port posed 38 questions to G&T.
- 26 - On June 4, 2007, G&T answered the Port’s questions of May 30 with a thick
 27 notebook of exhibits A-N; this response increased the Elcon Claim from \$1.7
 million to \$2.2 million.
- 28 - On June 6, 2007, the Port responded to G&T’s letters of May 28, 2007 and

1 May 31, 2007 by reiterating that the Port was proceeding to evaluate the REA
2 under articles G-04.31 and G09.05 of the contract.

- 3 - On June 21, 2007, the Port notified G&T that the schedule analysis contained
4 in its REA did not meet the contract requirements of specification section
5 01323. The Port requested a Time Impact Analysis as required and asked for a
6 date on which it would be provided. G&T did not respond to the Port's
7 requests.
- 8 - On August 30, 2007, the Port, prompted by G&T's submission of June 4,
9 2007, forwarded 52 questions and requests for clarification on all aspects of
10 the REA.
- 11 - On September 5, 2007, the Port explained to G&T its process of evaluation.
- 12 - On September 28, 2007, G&T responded to the Port's questions and requests
13 of August 30, 2007 with 55 pages of narrative and a notebook with 31
14 exhibits. In this submission, G&T reviewed various components of its REA.
15 Although not directly stated by G&T, it appears to the Port that the amount of
16 the REA increased to \$21.2 million (including the Elcon claim).
- 17 - On October 19, 2007, the Port requested additional information.
- 18 - On November 26, 2007, G&T responded to the Port's request of October 19,
19 2007 with answers to the Port's questions. It also revised the REA by deleting
20 the Elcon Claim but substantially increasing the amount being claimed by G&T
21 to \$18.3 million.
- 22 - On November 28, 2007, two days later, G&T delivered 10 notebooks of
23 additional documentation, most of which dealt with its subcontractors.

24 (*Id.* at 11-12).⁴

25 It is important to note that the Elcon claim mentioned above plays an important part in
26 the Port's argument that it is not possible to determine the precise amount due to G&T based
27 on its REA. G&T subcontracted electrical work on the C60 project to Elcon, and when G&T
28 submitted its REA to the Port, it indicated that approximately \$1.67 million of the \$16.6
million it requested was due to amounts G&T owed Elcon. (Dkt. #14, Decl. of Wright, ¶ 13).
The Port then alleges that G&T amended the Elcon claim on June 4, 2007, to approximately
\$2.2 million. (*Id.* at ¶ 20). The Port further alleges that on November 26, 2007, G&T
withdrew the Elcon claim, and asserted that "G&T is revising its claim to remove Elcon's
claim from G&T's in order to expedite G&T's claim . . . Elcon's claim will be separated from

⁴ G&T does not attempt to refute these facts in any of its moving papers.

1 G&T's [and] submitted separately as soon as the review is complete." (*Id.*, Ex. 13). As a
 2 result, the Port argues that the changing amounts of the Elcon claim have impacted the Port's
 3 ability to analyze the various components of the REA. (Dkt. #14 at 15).

4 While G&T and the Port were corresponding in regards to G&T's REA, G&T
 5 initiated the instant lawsuit in this Court on September 5, 2007, seeking a declaratory
 6 judgment that: (1) the Port immediately (a) notify G&T, in writing, of the specific amount it
 7 agrees, in good faith, it owes G&T under the main contract and under the Port issued change
 8 orders, and (b) pay G&T within seven (7) calendar days of that written notice, the full amount
 9 it admits in good faith it owes G&T, including interest in accordance with Washington law;
 10 (2) the Port has waived its right to proceed under the Dispute Resolution Process pursuant to
 11 the terms of the contract; and (3) in the alternative, require the parties to comply with the
 12 Dispute Resolution Process pursuant to the terms of the contract. (Pl.'s Compl., ¶¶ 4.1-6.2).

13 On November 29, 2007, G&T filed the instant motion for partial summary judgment,
 14 seeking to partially enforce the relief requested in its complaint. (Dkt. #7).⁵ The Port
 15 thereafter filed a cross-motion for summary judgment on December 17, 2007, seeking a
 16 declaratory judgment that: (1) the Port is proceeding properly under the contract to evaluate
 17 and process the REA submitted by G&T; (2) the Port does not owe G&T anything under the
 18 contract or applicable law until that process is complete; (3) the Port has not waived its right
 19 to evaluate the REA; and (4) G&T is not allowed to maintain this action or any other lawsuit
 20 until the dispute resolution process under the contract is complete. (Dkt. #14 at 1).

21 **B. Standard of Review**

22 Summary judgment is proper where "the pleadings, depositions, answers to
 23 interrogatories, and admissions on file, together with the affidavits, if any, show that there is

24
 25 ⁵ There are two differences between the relief requested in G&T's motion for partial summary
 26 judgment and its complaint. First, G&T makes the additional request in its motion that the disputed
 27 amounts should be determined at trial. However, G&T does not make such a request in its complaint.
 28 Second, G&T does not request in its motion for the Court to compel the parties to proceed with the Dispute
 Resolution Process pursuant to the contract, whereas G&T makes this request in count three of its
 complaint.

1 no genuine issue as to any material fact and that the moving party is entitled to judgment as a
2 matter of law.” Fed. R. Civ. P. 56©); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247
3 (1986). The Court must draw all reasonable inferences in favor of the non-moving party. *See*
4 *F.D.I.C. v. O’Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992), *rev’d on other grounds*,
5 512 U.S. 79 (1994). The moving party has the burden of demonstrating the absence of a
6 genuine issue of material fact for trial. *See Anderson*, 477 U.S. at 257. Mere disagreement,
7 or the bald assertion that a genuine issue of material fact exists, no longer precludes the use of
8 summary judgment. *See California Architectural Bldg. Prods., Inc., v. Franciscan Ceramics,*
9 *Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987).

10 Genuine factual issues are those for which the evidence is such that “a reasonable jury
11 could return a verdict for the non-moving party.” *Anderson*, 477 U.S. at 248. Material facts
12 are those which might affect the outcome of the suit under governing law. *Id.* In ruling on
13 summary judgment, a court does not weigh evidence to determine the truth of the matter, but
14 “only determine[s] whether there is a genuine issue for trial.” *Crane v. Conoco, Inc.*, 41 F.3d
15 547, 549 (9th Cir. 1994) (citation omitted). Conclusory or speculative testimony is
16 insufficient to raise a genuine issue of fact to defeat summary judgment. *Anheuser-Busch,*
17 *Inc. v. Natural Beverage Distributors*, 60 F. 3d 337, 345 (9th Cir. 1995). In the context of a
18 contract dispute, interpretation of a contract is a matter of law properly decided on summary
19 judgment. *United States v. King Features Entm’t, Inc.*, 843 F.2d 394, 398 (9th Cir. 1988).

20 **C. Applicable Law**

21 This case is properly before the Court based on diversity of the parties. Accordingly,
22 the issues presented are governed by Washington State law. *See Klaxon Co. v. Stentor*
23 *Electric Mfg. Co.*, 313 U.S. 487, 496 (1941); *Insurance Co. N. Am. v. Federal Express*
24 *Corp.*, 189 F.3d 914, 919 (9th Cir. 1999) (explaining that in an ordinary diversity case, federal
25 courts apply the substantive law of the forum in which the court is located). Neither party
26 disputes that Washington State law is applicable in this case.

28 **D. The Contract Provisions of the C60 Project**

1 It is well established under Washington contract law that contracts are interpreted
 2 according to the objective manifestation of the parties. *Hearst Communications, Inc. v.*
 3 *Seattle Times Co.*, 154 Wash. 2d 493, 503, 115 P.3d 262 (2005) (citing *Max L. Wells Trust v.*
 4 *Grand Cent. Sauna & Hot Tub Co. of Seattle*, 62 Wn.App. 593, 602, 815 P.2d 284 (1991)).
 5 “Courts should not, and cannot, rewrite the clear agreement of the parties.” *Warner v.*
 6 *Design and Build Homes, Inc.*, 128 Wn.App. 34, 42, 114 P.3d 664 (2005); *see also Childers*
 7 *v. Alexander*, 18 Wn.App. 706, 711, 571 P.2d 591 (1977) (holding that courts may not “foist
 8 upon the parties a contract they never made”). Courts simply do not interpret what was
 9 intended to be written, but rather what was in fact written. *Hearst*, 154 Wash. 2d at 504.

10 Further, while Washington courts have held that a trial court may examine extrinsic
 11 evidence “for the purpose of aiding in the interpretation of what is in an instrument,” *see Berg*
 12 *v. Hudesman*, 115 Wash. 2d 657, 669, 801 P.2d 222 (1990), Washington courts have made it
 13 equally clear that admissible extrinsic evidence does not include evidence that varies,
 14 contradicts, or modifies the written language of the contract. *Bort v. Parker*, 110 Wn.App.
 15 561, 574, 42 P.3d 980 (2003). Ultimately, and as *Hearst* makes clear, Washington law
 16 continues to follow the objective manifestation theory of contracts. 154 Wash. 2d at 503
 17 (unequivocally stating this holding to clarify its holding in *Berg* that may have been
 18 misunderstood to implicate the admission of parol evidence to all contracts). The subjective
 19 intent of the parties is therefore irrelevant if the intent can be determined from the actual
 20 words used in a contract. *City of Everett v. Estate of Sumstad*, 95 Wn.App 853, 855, 631
 21 P.2d 366 (1981). Moreover, words in a contract are to be given their ordinary, usual, and
 22 popular meaning unless the entirety of the agreement clearly demonstrates contrary intent.
 23 *Hearst*, 154 Wash. 2d at 504 (citing *Universal/Land Constr. Co. v. City of Spokane*, 49 Wn.
 24 App. 634, 637, 745 P.2d 53 (1987)).

1. G&T’s argument that the Port must pay within 30 days

26 In this case, G&T argues that when viewing the contract as a whole, the Port is
 27 compelled to pay G&T amounts set forth in G&T’s REA within 30 days. To support its
 28 argument, G&T points primarily to article G-08, titled “Payments, Completion and Final

1 Acceptance” (Dkt. #14, Ex. 1 at 34), and specifically references articles G-08.01, G-08.02, G-
2 08.04, G-08.06, and G-08.07. (Dkt. #7 at 7); (Dkt. #17 at 2).

3 As an initial matter, the Court notes that it is undisputed by either party that article G-
4 01.02, titled “Definitions,” expressly sets forth the operative definition of a “Claim.” (*Id.*).

5 The article provides:

6 A claim is a demand or assertion by one of the parties seeking, as a matter of right,
7 adjustment or interpretation of Contract terms, payment of money, extension of time
8 or other relief with respect to the terms of the Contract. The term “Claim” *includes*
9 *Requests for Equitable Adjustment* (until executed by agreed Change Order), disputes,
and other matters in questions between the Port and [G&T] arising out of or relating
to the Contract. Claims must be initiated by written notice. The responsibility to
substantiate Claims shall rest with the party making the Claim.

10 (*Id.* at 8) (emphasis added).

11 Furthermore, and for the sake of brevity, the Court finds it unnecessary to reiterate
12 each portion of the C60 project contract that G&T references. But the Court does find that
13 article G-08.04 A and B are relevant to this portion of the analysis. G-08.04 A and B, titled
14 “Progress Payments” provide in pertinent part:

15 Progress payments will be made following the Contractor’s request therefore once
16 each month during the Contract Time; payment shall be based upon invoices *approved*
17 *by the Engineer*. All requests for progress payments must be accompanied by
18 documentation required herein. The progress payment will not become due or be
19 processed without required documentation. *Progress payments will be made within*
20 *thirty (30) days of becoming due . . .* Payment shall be based upon the actual quantities
of Work performed *as verified and agreed by the Engineer* according to the Contract
documents.

21 (*Id.* at 34) (emphasis added).

22 Based on G-08.04 A, it is clear that G&T ignores the plain language of that article
23 which provides that “payment shall be based upon invoices approved by the Engineer.” (Dkt.
24 #14, Ex. 1 at 34). Furthermore, a payment becomes due within thirty days only after “verified
25 and agreed by the Engineer.” (*Id.*). Thus, only an *approved* payment triggers G&T’s right to
26 payment within thirty days. It is unequivocally clear that the REA was never approved by the
Port in this case.

27 In any event, the Court notes that the term “Claim” is noticeably absent from the
28 language of article G-08.04. As the Port indicates, G-08.04 applies to “Progress Payments,”

1 and not “Claims.” And as established above, neither party disputes that the REA is a “Claim.”
 2 Therefore G&T’s argument with respect to article G-08 is clearly erroneous. Consequently,
 3 the Court is not justified in entering a declaratory judgment in G&T’s favor requiring the Port
 4 to pay amounts not in dispute within thirty days.

5 **2. The Port’s argument that the provisions of G-09.05 control**

6 The Port argues that G&T’s REA is being reviewed in accordance with the terms of
 7 the contract given the language of article G-09.05, titled “Changed Conditions and Claims
 8 Including Requests for Equitable Adjustment.” (Dkt. #14, Ex. 1 at 44). Moreover, the Port
 9 argues that the provisions of G-09.06, titled “Procedures for Protest by the Contractor,” are
 10 not triggered until it reviews and analyzes G&T’s REA. Article G-09.05 A provides in
 11 pertinent part:

12 The Contractor shall notify the Engineer promptly orally and in writing in accordance
 13 with [the notice requirements of] G-04.31 of . . . alleged Contract conditions for which
 an adjustment in Contract Sum or Contract Time is desired.

14 (Dkt. #14, Ex. 1 at 44-45)

15 G-09.05 B goes on to provide in pertinent part:

16 If the Engineer determines that the alleged conditions do exist and cause a material
 17 change either in the Contractor’s costs . . . the Engineer will make an equitable
 18 adjustment in the Contract Sum to account for the performance of the work involved .
 . . If the Port and the Contractor agree on such adjustment, the same shall be set forth
 in a Change Order to be executed by the parties.

19 (*Id.* at 45) (emphasis added).

20 Article G-09.05 concludes with subsection C, which provides:

21 If the Engineer determines that the Contractor’s request does not warrant an equitable
 22 adjustment in the Contract Sum and/or Contract Time, the Contractor shall diligently
 23 pursue the Work in accordance with the Engineer’s direction *while retaining the right*
to protest the Engineer’s decision in accordance with paragraph G-09.06.

24 (*Id.*) (emphasis added).

25 Based on these provisions, the Port argues that G&T must await the Port’s evaluation
 26 of G&T’s REA before proceeding with the procedures set forth in G-09.06 for challenging a
 27 decision made by the Port. However, this argument would lead to an absurd result wherein
 28 the Port could simply deny any claim made by a contractor, and stand behind that denial

1 without allowing a contractor a method to challenge its decision. Further, the language of
 2 article G-09.05 C does not support the Port's position. It clearly states that G&T "retains the
 3 right to protest the Engineer's decision in accordance with paragraph G-09.06." (*Id.*). Here,
 4 it is undisputed that G&T provided its REA in accordance with G-09.05 A on May 10, 2007.
 5 It is further undisputed that the Port has not accepted this amount as evidenced by the minutes
 6 reflected in the three subsequent meetings following G&T's REA submission, as well as the
 7 continued correspondence it has engaged in with G&T questioning the accuracy of the REA.
 8 As a result, the Port has effectively denied G&T's REA, and G&T has no choice but to
 9 proceed under its clearly defined right to do so under article G-09.06.

10 The Port's argument that G-09.06 does not yet apply given the facts of this case is
 11 further undermined by reviewing the plain language of article G-09.06 B. That section
 12 provides in pertinent part:

13 If the Contractor disagrees with . . . *the Engineer's denial of a Request for Equitable*
 14 *Adjustment sought by the Contractor*, the Contractor shall give immediate oral notice
 15 of protest to the Engineer prior to performing the Work and shall submit a written
 16 protest to the Engineer within seven (7) calendar days of the Contractor's receipt of
 the Change Order. *The protest shall identify the point(s) of disagreement, those*
portions of the Contract believed to be applicable and an estimate of quantities,
costs, and any time extension involved in the change.

17 (*Id.*) (emphasis added).

18 This article clearly sets forth the preliminary procedure for which G&T is supposed to
 19 follow if the Port denies its REA. Thus, the Port's argument that G&T must simply wait for
 20 the Port to review G&T's REA before the G&T can exercise any right under the contract is
 21 nonsensical. As mentioned above, courts simply do not interpret what was intended to be
 22 written, but rather what was in fact written. *Hearst*, 154 Wash. 2d at 504. What was written
 23 and firmly embedded within this portion of the contract is a clear right for G&T to challenge
 24 the Port's decision not to accept G&T's REA. As a result, the Port's argument that the
 25 provisions of G-09.06 do not apply in the instant case is unfounded.

26 27 28 3. The provisions of article G-09.06 F - "The Dispute Resolution

1 **Process”**

2 The controlling article in regards to the Dispute Resolution Process is found in article
3 G-09.06 E. The article provides in pertinent part:

- 4 1. Level I. *Within seven (7) days of receipt of the Contractor’s documentation*
5 [of article G-09.06 D], the senior site representative of the Contractor and the
6 Resident Engineer of the Port shall meet, confer, and set a schedule for
 resolving the claim. Such schedule shall complete no later than 14 calendar
 days after the initial meeting.

7 (Dkt. #14, Ex. 1 at 46).

8 The article goes on to state very detailed procedures for Level II and Level III
9 meetings. (*Id.* at 46-47). G&T argues that it attempted to begin the Dispute Resolution
10 Process to no avail. For example, in correspondence to the Port on May 18, 2007, Mr.
11 Berndt stated that G&T believed its REA “to be a ‘Claim’ that must go through the Dispute
12 Resolution process under G-01.02 and G-09.06 F of the Contract.” (Dkt. #8, Decl. of
13 Berndt, Ex. 6). Mr. Berndt goes on to state, “[t]hat is why we saw our [May 16, 2007
14 meeting] as the first ‘Level I’ meeting, and hope we can resolve this ‘Claim’ by working
15 together through the Dispute Resolution Process sections.” (*Id.*). When the Port refused to
16 engage in the process, G&T continued to make clear that it believed it was proceeding
17 appropriately under the contract. A letter sent by Mr. Berndt to the Port on May 31, 2007
18 provides in pertinent part:

19 Although [G&T] appreciates the efforts of the Port in speaking with us and since
20 neither party, due to differences of opinion, were able to complete all elements in the
 schedule for resolving G&T’s claim by today, *14 calendar days after our initial 16*
21 *May 2007 Level I meeting*, in accordance with paragraph G-09.06 F1, Level I of the
 Dispute Resolution Process is closed. By this letter, [G&T] requests a Level II
 meeting be set . . . as required by paragraph G-09.06 F2.”

22 (*Id.*, Ex. 7).

23 G&T made further attempts to schedule a Level III meeting. (*Id.*, Ex. 9). G&T even
24 took the step to nominate Judge Robert Alsdorf (“Judge Alsdorf”) to the Dispute Review
25 Board on June 8, 2007. (*Id.*, Ex. 11). Notably, the Port seemingly acknowledged that the
26 Dispute Resolution Process was underway by asking for the resume of Judge Alsdorf and
27 indicating to G&T that “[w]e’re working on offering a candidate or candidates for you to look
28

1 at also.” (*Id.*, Ex. 12).

2 However, waiving a right to participate in the dispute resolution process “requires
3 *unequivocal* acts of conduct evidencing an intent to waive.” *Mike M. Johnson, Inc. v.*
4 *Spokane County*, 150 Wash. 2d 375, 391, 78 P.3d 161 (2003) (emphasis added). Equivocal
5 conduct by definition cannot be unequivocal. *American Safety Casualty Ins. Co. v. City of*
6 *Olympia*, 174 P.3d 54, 59 (2007). As clearly laid out above, G&T alone held the belief that it
7 was participating in the Dispute Resolution Process, and that the Levels I-III meetings were
8 not taking place in accordance with the contract. But there is no evidence that the Port
9 agreed that such meetings were taking place. In fact, the evidence indicates that the Port,
10 through Mr. Mequet, made clear to G&T that the Dispute Resolution Process was not
11 underway. Mr. Mequet’s declaration provides:

12 I advised [Mr.] Berndt . . . that the Port would treat this REA just the same as any
13 other REA that G&T had submitted on this and other projects at Sea-Tac. By that I
14 meant that the Port would follow the process it has always followed with contractors
15 for as long as I have been in charge of the major capital construction projects at Sea-
16 Tac: review and evaluate the REA to determine if it had merit; ask questions and seek
additional documents to clarify and understand the basis for the REA; work with the
contractor to resolve areas of disagreement; and try to reach an agreement on the
amount, if any, to be paid . . . It was premature to follow [the Dispute Resolution]
process until the Port had finished its evaluation.

17 (Dkt. #14, Decl. of Mequet, ¶ 6).

18 Additionally, evidence submitted by G&T themselves indicate that the Port did not
19 believe the procedures set forth in G-09.06 F were beginning. Notes from a meeting drafted
20 by G&T provide, “[t]he Port states this is an REA and not in the dispute resolution process at
21 Level One.” (Dkt. #8, Decl. of Berndt, Ex. 4).

22 The Port also points to the provisions of G-09.06 F6 to support its argument that it
23 has not waived any rights under the contract. That section provides:

24 If the claim is not resolved in the Level III meeting and no Dispute Review Board is
25 required, the Contractor may bring no claim against the Port in litigation unless the
claim is first subject to non-binding mediation or non-binding arbitration as mutually
agreed by the Port and Contractor.

26 (Dkt. #14, Ex. 1 at 47).

27 As a result, there is no evidence submitted by G&T that indicates that the Port waived
28

1 their right to participate in mediation or arbitration. Therefore the Port ultimately did not
2 waive their right to participate in the Dispute Resolution Process set forth in G-09.06 F. At
3 best, there is an email from the Port indicating that they were contemplating a nominee to the
4 Dispute Resolution Board. But a party that simply enters into negotiation does not
5 necessarily waive its contractual rights. *American Safety*, 174 P.3d at 59. Under such
6 circumstances, the Court cannot find that the Port *unequivocally* waived its rights under the
7 contract for the C60 project.

8 Furthermore, Washington contract law strongly favors the public policy of settlement
9 over litigation. *American Safety*, 174 P.3d at 59; *City of Seattle v. Blume*, 134 Wash. 2d 243,
10 258, 947 P.2d 223 (1997) (“[T]he express policy of this state . . . strongly encourages
11 settlement”); *Haller v. Wallis*, 89 Wash. 2d 539, 545, 573 P.2d 1302 (1978) (“[T]he law
12 favors amicable settlement of disputes”). Therefore the Court finds that the appropriate
13 remedy in the instant case is to enter a declaratory judgment compelling the parties to proceed
14 with the Dispute Resolution Process as set forth in article G-09.06 F. This remedy is further
15 buttressed by the fact that both parties agree to a certain extent on this result. For example,
16 the Port states in its reply that “should the court side with G&T and decide that [article] G-
17 09.05 is somehow not applicable to G&T’s REA, the correct declaratory ruling is that all
18 steps of the dispute resolution process under [article] G-09.06 should be followed with a
19 further ruling as to whether that process includes a Dispute Review Board.” (Dkt. #21 at 10-
20 11). In addition, G&T states in Count 3 of its complaint that the Court should “[i]n the
21 alternative . . . [require] the Port to comply with the ‘Dispute Resolution Process’ provisions
22 of the contract.” (Dkt. #1, Pl.’s Compl. ¶¶ 6.1, 6.2). Moreover, because the Court has
23 rejected both (1) G&T’s argument that the Port is required to pay G&T within 30 days, and
24 (2) the Port’s argument that it is properly proceeding under article G-09.05, compelling the
25 parties to proceed with the Dispute Resolution Process under article G-09.06 F is indeed the
26 most appropriate remedy.

27 **4. The parties have waived their right to appoint a nominee to the**
28 **Dispute Resolution Board**

1 The Port seeks a ruling from the Court to determine whether the parties have waived
 2 their right to nominate a candidate to the DRB as set forth in article G-09.06. (Dkt. #21 at
 3 10-11). SC-09.06 b, titled “Composition of the DRB” clearly controls. That section provides
 4 that “[t]he DRB shall consist of one member elected by the Port and one member elected by
 5 the Contractor. *Each of these members shall be elected within 60 days of the Award.*” (Dkt.
 6 #14, Ex. 1 at 72) (emphasis added). Further, “award” is defined by G-01.02 as the
 7 “[e]ffective date the Agreement Form is executed by the Port of Seattle, and the start of the
 8 Contract Time.” (*Id.* at 8).

9 Here, the Port indicates that the parties entered into the contract on May 14, 2004.
 10 (Dkt. #14 at 2). And while G&T never states the precise date the contract began, it indicates
 11 in its complaint that its bid was accepted in 2004. (Dkt. #1, Pl.’s Compl. ¶ 3.3). Thus, based
 12 on the plain language of the contract, for a party to exercise its right to nominate a member to
 13 the DRB, it must have done so within 60 days of May 14, 2004. However, the record before
 14 the Court is abundantly clear that G&T did not nominate a member to the DRB until June 8,
 15 2007. (Dkt. #8, Ex. 11). There is also no evidence that the Port nominated anyone to the
 16 DRB. The Court therefore finds that both parties have waived their right to nominate a
 17 member to the DRB.

18 **E. RCW 39.04.250(2)**

19 Because the Court finds that the appropriate remedy is to compel the parties to
 20 proceed with the procedures set forth in article G-09.06 F, the Court finds it unnecessary to
 21 address the parties’ respective arguments with respect to RCW 39.04.250(2).

22 **III. CONCLUSION**

23 Having reviewed the relevant pleadings, the declarations and exhibits attached thereto,
 24 and the remainder of the record, the Court hereby finds and orders:

25 (1) “Plaintiff G&T Conveyor Company, Inc.’s Motion for Partial Summary
 26 Judgment” (Dkt. #7) is DENIED.

27 (2) “Port of Seattle’s Cross Motion for Summary Judgment” (Dkt. #14) is
 28 GRANTED IN PART. The Court finds that Plaintiff is not allowed to maintain this action

1 until the Dispute Resolution Process under the contract between the respective parties is
2 complete.

3 (3) The parties are DIRECTED to commence with the Dispute Resolution Process
4 pursuant to article G-09.06 F of the contract no later than fourteen (14) days from the date of
5 the Order. Specifically, the parties shall conduct a Level I meeting pursuant to G-09.06 F1
6 and subsequently follow the remaining procedures set forth in G-09.06. However, the Court
7 finds that both parties have waived their right to nominate a member to the Dispute
8 Resolution Board, thereby rendering G-09.06 F5 null and void.

9 (4) Rather than dismissing the action, the Court finds it appropriate to STAY the
10 instant litigation. The parties shall submit a Joint Status Report within six (6) months
11 updating the Court on the status of their negotiations, at which time the Court shall dismiss
12 the action if appropriate.

13 (5) The Clerk is directed to forward a copy of this Order to all counsel of record.
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15 DATED this 7th day of March, 2008.



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17 RICARDO S. MARTINEZ
18 UNITED STATES DISTRICT JUDGE
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